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## SRBA v. City of Oakley, 237 P.3d 1 (Idaho 2010)

Michael L. Downey

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streams' flow in the 1960's and support its conclusion that the current IIFS flow was more than in the 1960's. Additionally, the Water Commission did not err in relying on USGS data or establishing the amended IIFS for the windward streams. The Water Commission also did not err in failing to include the unpermitted water in the amended IIFS because the Water Commission could support its conclusion that the current IIFS flow was greater than in the 1960's.

Accordingly, the court vacated PMI's water use permit and remanded the case for further proceedings consistent with the opinion.

*Kelly Miller*

## IDAHO

**SRBA v. City of Oakley, 237 P.3d 1 (Idaho 2010)** (holding that the Appellants had not established a right to the City's water through prior appropriation and could not acquire a right by prescription).

Bruce and Jared Bedke ("Appellants") paid the City of Oakley ("City") to use water from its pipes. However, Appellants claimed that they owned two distinct rights to the water. Appellants claimed that the first right had a priority date of 1955 and the second right had a priority date of 1964. Appellants used the water continuously from those appropriation dates until 1991. At that time, the City cut and capped the pipe and proposed a new agreement for the use of the water with Appellants. Appellants did not sign the agreement. Appellants then ceased payment and use of one of the alleged rights but continued use and payment of the other. In 2004, the Idaho Department of Water Resources recommended disallowing both of Appellants' rights. Appellants objected, arguing that they had met all the requirements for establishing water rights. The City responded to the objection, arguing that the basis for Appellants' alleged rights was their act of taking water from the city pipe, which was a claim to rights that actually belonged to the City.

A Special Master heard the dispute and rejected Appellants' argument. The Special Master recommended disallowing Appellants' rights and an award of attorney's fees to the City. Appellants appealed the Special Master's recommendation. On appeal, the District Court for the Fifth Judicial District of Idaho ("district court") rejected the challenge to the Special Master's recommendation as untimely and adopted the Special Master's recommendation of attorney's fees. The district court later rejected Appellants' motion to reconsider. Appellants then appealed to the Idaho Supreme Court ("court").

Appellants raised several issues on appeal. First, Appellants argued that the district court erred when it rejected the challenge to the Special Master's recommendation of disallowing the water rights as

untimely. The court disagreed, holding that the district court did not abuse its discretion when it did not find cause to justify an extension of time for confusion because the procedural instructions were clear.

Second, Appellants argued that the district court erred in adopting the recommendation of the Special Master to disallow the Appellants' water rights. In Idaho, the doctrine of prior appropriation requires that a party divert water and put it to beneficial use in order to take ownership of a water right. Any diversion work must belong to the one claiming a right. Appellants argued that they established water rights by appropriating spring water from the same spring as the City. The Appellants' theory was that they appropriated water from the spring through the City's diversion works (the pipes), the water then comingled with the City's water, and Appellants reclaimed it when they removed the water on the other end. Appellants had not constructed any points of diversion of their own; they were reliant on the City's diversions. Nonetheless, Appellants argued that a point of diversion is not necessary, citing to *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007), where the court upheld water rights without a physical diversion. However, the court rejected this argument, holding that *Joyce Livestock* created a narrow exception in which an actual point of diversion was not necessary for in stream livestock watering on the theory that livestock were diverting the water directly to themselves. This exception did not apply to Appellants because they were not claiming in stream livestock watering use. Accordingly, because Appellants could not demonstrate that they had diverted the spring water, the court held that the district court did not err in disallowing Appellant's water rights.

The court then addressed the Appellants' alternative theory, which was that the Appellants' had acquired a prescriptive right to the water. In Idaho, a private party cannot acquire an interest in property held by a municipality through adverse possession or prescription. Therefore, the court ruled that Appellants could not acquire a prescriptive right to the City's water. In addition, the court reasoned that Appellants' use of the water was with the City's permission, as evidenced by Appellants' voluntary payment of fees in exchange for use of the water before 1991. Thus, the court held that Appellants did not acquire a prescriptive right to the water.

Finally, the court reviewed the award of attorney's fees, finding that Appellants' claims were frivolous. Appellants did not cite any legal theory to support their claim that they could establish a right through the diversion works of another party or for the claim that they acquired a prescriptive right to the City's water. The court also added attorney's fees for all costs related to defending the appeal.

*Michael L. Downey*